

## FEDERAL HEALTH CARE REFORM- NURSING MOTHERS IN THE WORKPLACE

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In between the health care coverage mandates and the tax incentives in The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (jointly "Health Care Reform Act") is a little noticed provision that creates new federal rights for nursing mothers at work, and corresponding new obligations on their employers.

Effective March 23, 2010, when the Health Care Reform Act was signed into law by President Obama, Section 4207 of this Act amended the Fair Labor Standards Act ("FLSA") by adding a requirement that employers must allow mothers for a period of up to one year following birth of a child "reasonable break time" each time the mother needs to express breast milk. However, the employer is not required to pay the employee for this break time regardless of its length.

This law does not define what amount of time is a "reasonable break time" to express milk, nor does it set any limit on the number of breaks that can be taken per day for this purpose. This provision was introduced into the Health Care Reform legislation by Oregon Senator Jeff Merkley, based on existing Oregon law. The law in Oregon defines "reasonable time" as 30 minutes for every four hours worked. But, without such parameters in the federal Act, and at least until the U.S. Department of Labor issues regulations, common sense will have to prevail on the length and number of breaks a mother takes for this purpose. Employers should be mindful that the amount of time and the number of times a mother needs to express milk can vary greatly from one individual to the next.

Employers are further required by this law to provide a mother expressing milk with a place to do so "other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." While at first many employers will gnash their teeth and

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proclaim that there is absolutely nowhere in their workplace that can possibly be used for this purpose a calmer look around will almost always yield an acceptable solution. A simple solution could be to install a lock on an empty office or conference room door and make it available for this purpose.

This law applies very broadly to all employers covered by the FLSA. However, employers with less than 50 employees do not have to comply if doing so would impose “undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer’s business.” This law does not define “undue hardship,” and the burden to prove it will undoubtedly rest on the employer who chooses not to comply on this basis. Using the yardstick of other employment laws that have this same exemption of “undue hardship” employers with less than 50 employees who want to use this exemption should expect “undue hardship” will not be an easy test to meet. Not impossible, but an employer who chooses not to comply better be armed with very strong evidence supporting its contention that complying would cause it “undue hardship.”

Currently 24 states, Puerto Rico and the District of Columbia already have laws requiring employers in those state to allow mothers to express milk at work. Unlike the new federal Act, some of these state laws require that time an employee spends on break expressing milk must be paid. This new federal law is a supplement to any such state law. Employers with employees in a state with its own law on this issue must give nursing mothers the greatest protections and benefits allowed under both the federal and applicable state law.

In New England, Maine, Vermont, Connecticut and Rhode Island have laws similar to the federal Act specifically requiring employers to provide mothers with a reasonable amount of time and a place to express milk in private. New Hampshire and Massachusetts do not. The laws of Maine and Rhode Island extend the requirement that breaks to express milk be allowed for up to 3 years following childbirth.

Since the maximum duration of the federal mandate is one year from when a mother gives birth, and as many mothers are out on leave for the first 6-12 weeks after giving birth, then unless there is a gross abuse employers should be cautious before denying these breaks or disciplining an employee for excessive use. An employee that abuses her rights under this law may also have other work performance issues. It will almost always be better for an employer to happily comply with the requirements of this law so that in taking action on other performance issues the employee will not be able to maintain that the discipline was in retaliation for exercising a protected right..

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Given this new federal law, any employer who is not going to assert the less than 50 employee exemption of “undue hardship” should notify employees who are within the first year after giving birth or who are returning from maternity leave of their rights under the law. When doing so an employer should let the employee know that it is happy to discuss what if any breaks they anticipate needing for this purpose, how those breaks will be handled, if leaving their worksite creates issues, whether these breaks will be paid or unpaid, any timekeeping issues and what space that will be available for their use.

If you would like assistance developing a policy to effectuate this new law, please contact any member of Devine Millimet’s Labor & Employment Law Practice Group.

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